No. 272

IN THE

SUPREME COURT OF THE UNITED STATES

RESERVE LIFE INSURANCE COMPANY,
GEORGE WASHINGTON LIFE INSURANCE COMPANY, and
PROFESSIONAL INSURANCE CORPORATION,

Petitioners,

vs.

BANKERS LIFE AND CASUALTY COMPANY,
J. EDWIN LARSON and HARTFORD ACCIDENT and INDEMNITY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI
to
THE UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

JAMES A. DIXON
908 Ainsley Building,
Miami 32, Florida,
Attorney for Petitioners.

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Respondents.

PETITION FOR WRIT OF CERTIORARI to THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Your petitioners, RESERVE LIFE INSURANCE COMPANY, GEORGE WASHINGTON LIFE INSURANCE COMPANY and PROFESSIONAL INSURANCE CORPORATION, hereby petition this Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and make respondents thereto BANKERS LIFE AND CASUALTY COMPANY, J. EDWIN LARSON and HARTFORD ACCIDENT AND INDEMNITY COMPANY.

Your petitioners show:

(a) **The Opinion Below**

The opinion of the District Court has not been reported, but it appears in the printed record filed herewith at Vol. V, page 2777. The opinion of the Court of Appeals has not yet been reported, but its opinion and judgment appear in appendices hereto.

(b) **Grounds on which the jurisdiction of the Court is invoked.**

(i) The final judgment in the District Court is dated October 18, 1956, and was entered October 19, 1956. The opinion of the United States Circuit Court of Appeals is dated June 30, 1958. The mandate thereon has not been issued, issuance having been stayed, pending this application for certiorari, pursuant to motion of the petitioners herein.

(ii) No order has been made respecting a rehearing, as no rehearing has been applied for. No extension of time to petition for certiorari has been applied for or granted.

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by certiorari is 28 U. S. C., sec. 1254 (1).

(c) **The Questions Presented for Review.**

(i) May an action for treble damages be maintained for a supposed conspiracy in restrain of trade in the market for life, accident and health and hospitalization insurance, where the record shows without controversy that:

(a) only a single competitor in a highly competitive market is alleged or proved to have suffered injury, and

(b) where, during the pendency of the supposed conspiracy, the number of suppliers of the commodity was constantly increasing, and

(c) the price of the commodity continued freely competitive at all times, and

(d) the supply of the commodity was unlimited at all times, and

(e) no member of the public was at any time at loss to obtain the commodity at fully competitive prices, and

(f) there was no diminution of the quality of the commodity in question or any other adverse effect upon competition in the relevant market.

(ii) Under the circumstances mentioned in the preceding question, is the granting of a summary judgment in favor of the defendants reversible error?

Other questions were presented to the Court of Appeals, but it is believed that these are the basic and controlling questions in this case. Such other questions are reserved for determination in other appropriate proceedings.

(d) The statutes which the case involves are:

(i) Section 1 of the Sherman Act, 15 U. S. C., Sec. 1, and

(ii) Section 4 of the Clayton Act, 15 U. S. C., Sec. 15.

The text of these sections appears in an appendix hereto. Section 16 of 15 U. S. C. is not involved herein because no criminal prosecutions or equity proceedings have been instituted by the Government in connection with the subject matter of this suit.

(e) **Statement of The Case.**

The plaintiff, BANKERS LIFE AND CASUALTY COMPANY, hereafter referred to as BANKERS, is a corporation engaged in writing life, accident and health and hospitalization insurance in practically every State in the Union. The defendants were originally ZACK D. CRAVEY, Insurance Commissioner of Georgia, J. EDWIN LARSON, Insurance Commissioner of Florida, HARTFORD ACCIDENT AND INDEMNITY COMPANY, the surety upon MR. CRAVEY'S official bond, three insurance companies competitive with the plaintiff BANKERS, RESERVE LIFE INSURANCE COMPANY, GEORGE WASHINGTON LIFE INSURANCE COMPANY and PROFESSIONAL INSURANCE CORPORATION, hereafter collectively referred to as RESERVE, and MR. C. C. BRADLEY, who was never served with process and who was subsequently dismissed as a party.

Shortly after this suit was filed in 1952, the case was

severed as to MR. CRAVEY and transferred to the Northern District of Georgia. This transfer was the subject of mandamus proceedings in the Fifth Circuit and in this Court.

Bankers Life & Casualty Co. v. Holland, Judge
199 F. (2nd) 593
346 U. S. 379.

The case against MR. CRAVEY was subsequently dismissed on motion of the plaintiff.

The jurisdiction of the Federal Court was invoked in the first instance by the plaintiff charging the defendants with a violation of the Sherman Act, Section 1.

The plaintiff's case was framed upon the theory that about 1949, the Insurance Commissioners of Georgia and Florida formed a conspiracy "to suppress, eliminate and destroy plaintiff's business in Florida, Georgia and elsewhere." (Record Vol. I, page 8.) RESERVE is supposed to have joined the conspiracy about 1951.

The plaintiff claims a private injury because MR. CRAVEY, in 1951, refused to renew its license to do business in Georgia, and some of its agency staff were employed by RESERVE. The plaintiff also claims a private injury because, at the supposed instigation of MR. CRAVEY and MR. LARSON, it was subjected to an examination by the National Association of Insurance Commissioners sooner than would normally have been the case. The plaintiff also claims a private injury by reason of certain acts of MR. LARSON, such as refusing to license its agents, disapproval of its policy forms, criticisms of its

advertising and handling of claims, etc. The plaintiff also claims that insurance commissioners of other states were influenced against it by MR. LARSON and MR. CRAVEY, although the extent or effect of this is left extremely vague.

Extensive use of pre-trial discovery was made by all parties. The printed record contains 67 depositions, and many others were taken which do not appear in the record. Both sides obtained production of documents, and answers to interrogatories, including the names of prospective witnesses. After four years of these proceedings, the District Judge set the case for pre-trial hearing. (Record, Vol. IV, page 2043).

All parties thereupon moved for summary judgment (Plaintiff's motion, Record, VOL. V, page 2705; LARSON'S motion, Record, Vol. IV, page 2088; RESERVE'S motion, Vol. IV, page 2044). The motions of LARSON and RESERVE were supported by additional evidence in the form of affidavits and exhibits. The plaintiff did not support its motion by affidavits or otherwise, and did not file affidavits in opposition to those attached to the motions of LARSON and RESERVE, nor did it request further time to do so or make any attempt to show that any additional evidence would be otherwise available to it upon a trial.

The evidence thus adduced before the Court failed to show that any person, firm or corporation other than the plaintiff, or any member or class of the public, had suffered any injury as a result of the supposed conspiracy. On the contrary, it showed affirmatively:

1. *That the number of suppliers of the commodity in question (life, accident and health and hospitalization insurance) in Georgia and Florida had risen steadily during the operation of the supposed conspiracy.* This appears from a tabulation prepared by the Insurance Commissioner of Florida, which is attached to his deposition and appears at Record, Vol. V, page 2655. This further appears from a tabulation of the suppliers of this commodity in Georgia, attached to an affidavit of Mr. CRAVEY filed in support of RESERVE'S motion for summary judgment (Record, Vol. IV, pages 2049 to 2077). Both of these tabulations are completely uncontradicted.

2. *Any member of the public who desired to buy life, accident and health and hospitalization insurance in either Georgia or Florida could do so without difficulty.* The plaintiff took a series of depositions at various places in Georgia from members of the public who had written to the plaintiff after MR. CRAVEY had refused to renew its license. Every one of these witnesses who was interrogated to this end had obtained other satisfactory insurance coverage without difficulty. These depositions begin at four places in the printed record (Record, Vol. III, page 1143, page 1277, page 1306, page 1405). There is no contrary evidence in the record.

3. *During the operation of the supposed conspiracy, the premiums collected by the plaintiff in Florida rose at a steady, indeed a spectacular rate.* This appears from a tabulation attached to MR. LARSON'S deposition (Record, Vol. V, page 2547).

There is no contrary evidence in the record.

4. *The statutes of both Florida and Georgia place no limit upon the amount of insurance which any company may write, subject only to the reserves required to keep it solvent.* Judicial notice of this fact is invited.

5. *The statutes of neither Georgia nor Florida regulate the rates charged by insurance companies for these types of coverage.* Judicial notice of this fact is invited.

6. *At all times during the operation of the supposed conspiracy, the rate situation was completely competitive.* This appears in Mr. LARSON'S deposition (Record, Vol. V, page 2428). It is uncontradicted in the record.

After hearing two days of oral argument and with the assistance of briefs from all counsel, the District Court denied the plaintiff's motion for summary judgment, and granted the motions of the defendants.

The plaintiff thereupon took an appeal to the Court of Appeals. Extensive briefs were filed by all parties. The case was argued orally on April 8, 1958. After the oral argument, there came to the attention of counsel for RESERVE three additional cases bearing upon the questions proposed by this petition for certiorari, which were called to the attention of the sitting judges of the Court of Appeals before the rendition of its opinion. These cases are:

Miller Motors, Inc. v. Ford Motor Co.
252 F. (2nd) 551 - C. C. A. 4

Riggall v. Washington County Medical Society
249 F. (2nd) 266 - C. C. A. 8

Klor's, Inc. v. Broadway-Hale Stores, Inc.
255 F. (2nd) 214 - C. C. A. 9.

The special significance of two of these cases will be pointed out hereafter. The last mentioned is now pending before this Court on petition for certiorari and is No. 76 on its docket for the October, 1958 Term.

Reasons For Granting The Writ

It is believed that certiorari should be granted in this case because:

1. The opinion of the Fifth Circuit herein is contrary to the following cases from other circuits, which hold that something more than private injury to one of many competitors must be shown to support a treble-damage action:

First Circuit:

Wm. Filene's Sons Co. v. Fashion Originators' Guild,
90 F. (2nd) 556.

Second Circuit:

Interborough News Co. v. Curtis Publishing Co.,
225 F. (2nd) 289.

Third Circuit:

Hunt v. Ciumbach,
143 F. (2nd) 902, affirmed 325 U. S. 821.

Leader v. Apex Hosiery Co.,
108 F. (2nd) 71, affirmed 310 U. S. 469.

D. C. Circuit:

Packard Motor Co. v. Webster,
243 F. (2nd) 418.

Fourth Circuit:

Schwing v. Hudson Sales Corp.,
239 F. (2nd) 176.

Miller Motors, Inc. v. Ford Motor Co.,
252 F. (2nd) 441.

Eighth Circuit:

Riggall v. Washington County Medical Society,
249 F. (2nd) 266.

Ninth Circuit:

Klor's, Inc. v. Broadway-Hale Stores, Inc.,
255 F. (2nd) 214.

Tenth Circuit:

Shotkin v. General Electric Co.,
171 F. (2nd) 236.

Fedderson Motors v. Ward,
180 F. (2nd) 519.

2. The opinion of the Fifth Circuit herein is contrary to at least two of its own previous decisions:

Hudson Sales Corp. v. Waldrip,
211 F. (2nd) 268.

Kinnear-Weed Corp. v. Humble Oil Co.,
214 F. (2nd) 891.

3. The opinion of the Fifth Circuit herein is contrary to previous decisions of this Court:

Wilder Mfg. Co. v. Corn Products Co.
236 U. S. 165.

Apex Hosiery Co. v. Leader,
210 U. S. 469.

4. The opinion of the Fifth Circuit herein misinterprets and misapplies the recent decision of this Court in

Radovich v. National Football League,
352 U. S. 445.

Although the opinion herein does not cite *Radovich*, that case was much argued on brief and orally before the Fifth Circuit, and in view of the Fifth Circuit's departure from its previous opinions, it is believed that its opinion in this case was influenced by the opinion in that case.

5. Where facts which show that plaintiff has no cause of action are undisputed in the record, after

the plaintiff has had four years of opportunity to disprove them, summary judgment is appropriate, and the possibility that the plaintiff may "better its case" before trial is not sufficient to reverse the summary judgment.

ARGUMENT

It is obvious that the panel of judges who heard this case in the Fifth Circuit were irritated by the size of the record, and we think it is fairly clear that they did not make a "line by line" examination of it. But to decide the question of the existence of an injury to the public, the Fifth Circuit did not need to make a "line by line" examination of the record, nor is it necessary for this Court to do so. We implore this Court, as we did the Fifth Circuit, not to be appalled by the size of the record and jump to the conclusion that in 3,000 pages there must be some disputed fact which would preclude summary judgment. Whatever may be true as to other issues in the case, it is not true of this issue of public injury. The facts, which, without dispute, show that there has been no public injury, are few in number and were clearly pointed out to the Fifth Circuit in RESERVE'S brief. The briefs of the plaintiff did not even suggest any dispute as to these facts.

The opinion of the Fifth Circuit refers to *allegations* in the complaint, which it regards as sufficient to charge public injury. However, allegations are not enough to prevent the entry of summary judgment when a *factual* showing to the contrary is made. The Fifth Circuit has so held in a strong opinion in which two of the Judges who sat in this case participated.

Bruce Construction Company vs. U. S.
242 F. 2d 873.

This Court itself has suggested the desirability of summary judgment procedure in complex but unfounded antitrust cases to avoid "an expensive, full-dress trial".

U. S. vs. Employing Plasterers Association
347 U.S. 186, at 189.

The facts which we have cited above in the Statement of the Case, paragraphs 1 through 6, (page 7), are clearly uncontradicted. It is also clear that these are *all* the facts in the record bearing on the question of the effect of the supposed conspiracy upon competition in interstate commerce. The only question is what inferences *as a matter of law* should, or can, be made from them, even taking these facts in the light most favorable to the plaintiff.

The Conflict with Other Circuits.

Under these circumstances, the opinion of the Fifth Circuit is contrary to that of the other circuits and of this Court mentioned above. We believe that the conflict will be made best to appear by a series of quotations from the cited cases, or lower court opinions approved therein.

First Circuit:

Wm. Filene's Sons Co. v. Fashion Originators' Guild,
90 F. (2nd) 556.

"The master's report does not disclose any of

the characteristics of an unreasonable restraint of trade or monopoly in violation of the Sherman Act . . . the essential elements of which are (1) price control, (2) production control, (3) deterioration in quality. The fundamental test, . . . is a detriment to the public."

(at page 559)

Second Circuit:

Interborough News Company v. The Curtis Publishing Co.,
225 F. (2nd) 289.

"The Sherman Act is designed to assure to the public at large the benefits which accrue from the flow of commerce and trade unrestricted by unreasonable restraints thereon. The public interest is sought to be protected; private interests are only incidentally within its protective force in that private rights encroached upon by violations of the Act may be vindicated through the processes of Sections 4 and 16 of the Clayton Act in order to protect the paramount public interest . . .

"The final test to be applied to plaintiff's First Separate Claim to determine whether Section 1 of the Sherman Act was violated is whether the defendants' several refusals to deal with plaintiff necessarily had or will have any substantial pernicious effect on the commerce concerned in the sense that an adverse effect therefrom will

be felt by the public. No such element of public injury is proven by the testimony and exhibits in the case."

(Quoted from same case in the District Court, 127 F. Supp. at pages 297 and 301, affirmed by the Second Circuit).

Third Circuit:

Hunt v. Crumboch,
143 F. (2nd) 902.

"Accordingly, the sole question for our consideration is whether the fact that the defendants' actions caused the plaintiffs to go out of business and to cease hauling in interstate commerce is such a restraint upon interstate commerce as to be cognizable under the Sherman and Clayton Acts. This question must be answered in the negative. Congress did not undertake by the enactment of the Sherman and Clayton Acts to prohibit each and every restraint upon interstate commerce. It sought to prevent only those restraints upon free competition in business or commercial transactions which tend to restrict production, raise prices or otherwise control the market in goods or services to the detriment of the public. . . It is in the public interest that the supply of commodities and services be undiminished and the cost not increased. From the standpoint of the public, however, it is immaterial whether the plaintiffs or others provide the services."

(At pages 903 and 904)

Leader v. Apex Hosiery Co.,
108 F. (2nd) 71.

"The interruption of production incurred by the appellee through the acts of the appellants had small effect upon interstate commerce. The combination was not such that by reason of the intent of the conspirators or the inherent nature of their acts public interest was prejudiced by unduly restricting competition or obstructing trade. . . . It follows, we think, that the appellants were not guilty of violating the Sherman Act . . ."

(At page 79)

Fourth Circuit:

Schwing Motor Company v. Hudson Sales Corp.,
239 F. (2nd) 176.

"The main purpose of the anti-trust laws is to protect the public from monopolies and restraints of trade, and the individual right of action for treble damages is incidental and subordinate to that main purpose. . . Public injury alone justifies the threefold increase in damages. It is essential, therefore, that the complaint allege facts from which it can be determined that the conduct charged to be in violation of the anti-trust laws was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce."

(Quoted from Opinion of District Court, 138 Fed. Supp. 899, at page 903, adopted as the Opinion of the Fourth Circuit)

Miller Motors, Inc. v. Ford Motor Company, 252 F. (2nd) 441.

"Therefore, there being no showing of any public injury resulting from a restraint of commerce in automobiles or advertising, it cannot be said that the Sherman Act has been violated."

(At page 447)

Eighth Circuit:

Riggall v. Washington County Medical Society, 249 F. (2nd) 266.

"The Sherman Anti-Trust Act was not primarily to protect the individual but to protect the general public economically, and a private party may not recover under the act unless there has been an injury to the general public economically."

(At page 268)

Ninth Circuit:

Klor's, Inc. v. Broadway-Hale Stores, 255 F. (2nd) 214.

"The purpose of the antitrust statutes is to

protect the 'public' from the harm which follows from concerted or monopolistic conduct designed to acquire control of a market, usually competitive, to which the public must ultimately resort and which conduct can be described as an undue restraint of trade. Notwithstanding the many phrases which may be picked at random out of numerous cases and, out of context, be made to support the position that concerted conduct directed at harming the opportunity of a single trader to compete is always within the prohibitions of the Sherman Act, it is our opinion that there exists the need to show facts in a motion such as this from which a court might reasonably infer 'public injury' before an antitrust violation is before the court; and, further, that the Supreme Court has not departed one whit from this requirement."

(At page 231)

Tenth Circuit:

Shotkin v. General Electric Co.,
171 F. (2nd) 236.

"It is essential to recovery in an action of this kind that plaintiff allege and prove two things, a violation of the Act, and damages to plaintiff proximately resulting from the acts and conduct of the defendants which constitute the violation of the Act. Injury to plaintiff, of itself and alone, is not sufficient to warrant a civil action of this nature for injunctive relief and damages.

There must be harm to the general public in the form of undue restri tion of trade and commerce as the result of the rongful contract, combination, or concert. . . The injury to the public need not be nationwide in geographical scope. If it involves monopolistic effect upon interstate commerce, it is enough even though it be narrow in geographical extent. . . . But it must injuriously affect public interest, and the effect must be appreciable."

(At page 238, 239)

Feddersen Motors, Inc. v. Ward,
180 F. (2nd) 519.

"But injury to plaintiff alone is not enough upon which to predicate such an action. There must be harm to the general public in the form of undue restriction of interstate commerce."

(At page 522)

The Conflict With Prior Fifth Circuit Cases

The opinion of the Circuit herein is contrary to at least two of its own previous decisions, as will appear from brief quotations therefrom.

Hudson Sales Corp. v. Waldrip,
211 F. (2nd) 268.

"In support of its second contention that the findings are clearly erroneous, appellant, citing

some of the many cases dealing with suits of this general nature, which have firmly established the principle that an essential to a private recovery is a showing of a public injury, and that only unreasonable restraints of interstate commerce, restraints which substantially affect competition or which have the purpose or effect of raising or fixing market prices, are condemned under Section 1 of the Sherman Act, points to the complete absence from the evidence of proof that defendant was guilty of any such acts."

(At pages 270, 271)

Kinnear-Weed Corp. v. Humble Oil & Refining Co.,

214 F. (2nd) 891.

"Public injury alone justifying the threefold increase in damages and being an indispensable constituent of a claim for violation of the antitrust laws, a general allegation of such injury is not sufficient. It is essential that the complaint allege facts from which it can be determined that the conduct charged to be in violation of the antitrust laws was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce."

(At pages 893, 894)

The Conflict With Prior Supreme Court Cases

The opinion of the Fifth Circuit herein is contrary to previous decisions of this Court.

Wilder Mfg. Co. v. Corn Products Ref. Co.,
236 U. S. 165.

"In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented. . ."

(At page 174)

Apex Hosiery Co. v. Leader,
310 U. S. 467.

"It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon the prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition."

(At page 500)

The Necessity of Injury To The Public Interest. Injury To A Single Competitor Among Many Not Enough

As we have pointed out above, the uncontradicted proof in the record shows that the supply of the commodity remained unlimited during the operation of the supposed conspiracy, that the number of suppliers of the commodity was constantly increasing, that no member of the public had any difficulty obtaining all of the commodity desired, and that the price was fully competitive at all times. Damage to a single competitor in a highly competitive market is not sufficient to constitute a violation of Section 1 of the Sherman Act. In Apex Hosiery Co. v. Leader, 310 U. S. 469, this Court said:

> "So far as appears the delay of these shipments was not intended to have and had no effect on prices of hosiery in the market, and so was in that respect no more a restraint forbidden by the Sherman Act than the restriction upon competition in the course of trade held lawful in Appalachian Coals v. United States, 288 U. S. 344, 77 L. Ed. 825, 53 S. C., 471, Supra, because notwithstanding its effect on the marketing of coal it nevertheless was not intended to and *did not affect* the market price." (Emphasis supplied.)

The Court of Appeals of the Third Circuit in Hunt v. Crumboch, 143 F. (2nd) 902, affirmed in 325 U. S. 821, said:

> "In the light of the District Court's findings, which is supported by the evidence, that the interstate business of the A & P and the Sterling

Supply Company was not affected by the discontinuance of the Plaintiff's services, in other words, that the two companies continued to transport the same quantity of produce, foodstuffs and other products in interstate commerce as they would have done had they renewed their hauling contract with the plaintiffs, it is self-evident that in that respect the Plaintiffs have not made out a cause of action, since there was in fact no restraint of trade or commerce carried on by the A & P and the Sterling Supply Company. Accordingly, the sole question for our consideration is whether the fact that the Defendants' action caused the Plaintiffs to go out of business and to cease hauling in interstate commerce is such a restraint upon interstate commerce as to be cognizable under the Sherman and Clayton Acts. This question must be answered in the negative . . . 'The Sherman Act,' said Justice Stone in the Apex Hosiery Company case, 'was not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to "monopolize the supply, control its price, or discriminate between its would-be purchasers."' (We must assume, for nothing to the contrary appears in the Plaintiffs' case, that the number of haulers available to haul produce and foodstuffs was not diminished but *simply that some other hauling concern took over the work formerly performed by the plaintiffs* and that there was no increase in

the cost of hauling traceable to the acts of the Defendants in eliminating the Plaintiffs from the field. It is in the public interest that the supply of commodities and services be undiminished and the cost not increased. *From the standpoint of the public, however, it is immaterial whether the plaintiffs or others provide the services.*)" (Emphasis supplied.)

The District Court in Schwing v. Hudson Sales, 138 Fed. Supp. 899, in an Opinion adopted by the Fourth Circuit, said:

"The main purpose of the anti-trust laws is to protect the public from monopolies and restraints of trade, and the individual right of action for treble damages is incidental and subordinate to that main purpose. Wilder Mfg. Co. v. Corn Products Co., 236 U. S. 165, 174; Glenn Coal Co. v. Dickinson Fuel Co., (4. Cir.) 72 F. 2d 885, 889. Public injury alone justifies the threefold increase in damages. It is essential, therefore, that the complaint allege facts from which it can be determined that the conduct charged to be violation of the anti-trust laws was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce. Apex Hosiery Co. v. Leader, (1940-1943 Trade Cases Par. 56,039), 310 U. S. 469; Wilder Mfg. Co. Corn Products Co., 236 U. S. 165; Glenn Coal Co. v. Dickinson Fuel Co., (4 Cir.) 72 F. 2d 885; Brosius v. Pepsi-Cola Co., (3 Cir.) 155 F. 2d 99; Kinnear-Weed Corp. v. Humble Oil and Refining Co., (5 Cir.) (1954 Trade Cases, Par. 67,822), 214 F.

2d 891, 893; Hudson Sales Corp. v. Waldrip (1954 Trade Cases, Par. 67,694) (5 Cir.), 211 F. 2d 268; Boro Hall Corp. v. General Motors Corp., 124 F. 2d 822; Feddersen Motors v. Ward, 180 F. 2d 519; Riedley v. Hudson Motor Car Co., 82 F. Supp. 8.

"In an effort to meet the requirements of these cases, plaintiffs have claimed in their amended complaints that as a result of the alleged combination and conspiracy and virtual monopoly, the public in the Baltimore area and in the State of Maryland has been injured and damaged in a number of ways.

"Subparagraph 10(A) of each complaint alleges that during the year 1952 fewer Hudson automobiles moved in interstate commerce into the State of Maryland than would have so moved if there had been no such combination and conspiracy and in particular, that Hudson refused to accept orders for some 357 new Hudson automobiles from the plaintiffs in accordance with their respective quotas. It is further alleged, on information and belief, that the 357 Hudson automobiles were not otherwise sold in the State of Maryland, from which plaintiffs draw the conclusion that 357 new Hudson automobiles did not move in interstate commerce into the State of Maryland which but for said conspiracy and combination would have so moved. There is no allegation that Hudson did not ship to plaintiffs and to its other dealers in 1952 a sufficient number of automobiles to supply all persons in the City of Baltimore and elsewhere in the State of Mary-

land who wished to buy Hudson automobiles. There is no allegation that there was any dearth in the supply of automobiles in general, or of Hudson automobiles in particular. It is not alleged that the public could not have bought as many Hudson automobiles as it wished either from Bankert or from the two other Hudson dealers in the Baltimore metropolitan area. The allegation, on information and belief, that the 357 automobiles were not otherwise sold, and that 'it is believed' that an even greater number could have been sold had it not been for the alleged conspiracy, *does not show that in 1952 the public was unable to buy at competitive prices all of the automobiles that it wished to buy*, or even that it was unable to buy at competitive prices all of the Hudson automobiles which it wished to buy.

"Subparagraph 10(b) alleges that the registration of new Hudsons in Baltimore City declined approximately 36% during the five-month period from January 1, 1953, to May 31, 1953, as a result of the unlawful combination and conspiracy. Plaintiffs compare this decline with a decline of less than 1% in an average of thirty-two states during the twelve-month period from May 31, 1952, to May 31, 1953. Several doubts immediately arise. The two periods are not comparable. The figures show merely that for one reason or another the Maryland public purchased fewer Hudson automobiles. The decrease may well have been due to *competition with other makes, which continued unabated*. It is hard to understand why Hudson should have conspired with anybody to

sell fewer Hudson automobiles. But assuming that the decrease in sales was the result of the conspiracy, it does not follow that the public was injured, or that there was any such restraint of trade as is forbidden by the anti-trust laws. In Apex Hosiery Co. v. Leader, (1940-1943 Trade Cases, Par. 56,039) 310 U. S. 469, there is a full discussion of the purpose of the act and history of the cases construing it. See particularly pages 495, et seq. One of the grounds of decision in the Apex case was that the public was not injured by the fact that 1,000 dozen pairs of Apex stockings failed to move in interstate commerce, because the conspiracy had no effect *on the market of the general commodity*, and did not give the conspiring group the power to fix prices, restrict production, or lessen quality with impunity, inasmuch as the general market remained in its normal competitive state. So, in the case at bar, the public was not injured by the alleged fact that 357 Hudson automobiles failed to move in interstate commerce, since the market *in the general commodity*, automobiles in all price ranges, remained in its normal competitive state. The Apex case emphasized market control as a prerequisite for violation of the Sherman Act. See also Appalachian Coals, Inc. v. U. S., 288 U. S. 344, 360; U. S. v. International Harvester Co., 274 U. S. 693, 704.

"The distinction between restraints which produce an effect upon the market *in a commodity generally* and those restraints which affect a relatively minor brand in a highly competitive

market of the general commodity was recognized by Judge Chesnut in Arthur v. Kraft-Phenix Cheese Corp., 26 F. Supp. 824. In that case the amended declaration alleged that the corporate defendant conspired with one of its dealers to refuse to sell its private brand products to the plaintiff, another dealer, at dealers' discount, unless plaintiff would buy out, or sell out to, the defendant dealer. The Court distinguished the case of Binderup v. Pathe Exchange, Inc., 263 U. S. 291, on the ground that the Binderup case involved defendants who controlled the 'distribution of all films' in the United States, and distinguished Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359, on the ground that the monopoly there charged was the monopoly of 'the trade in photographic supplies.' Judge Chesnut said:

> 'These two cases, one illustrating a restraint of trade, and the other a monopoly of trade, are very different from the case as made in the declaration here. The articles of trade here involved are cheeses and mayonnaise of which there is common knowledge that there are many makes and brands on the market. Although the declaration alleges that the defendant corporation is the result of several combinations of other corporations, there is no allegation of any effort or attempt to monopolize the market in cheese or mayonnaise products generally. Nor is there any allegation of any combination or conspiracy between two or more manufacturers of cheese and mayon-

> naise products to deprive the plaintiff of an opportunity to deal in cheese and mayonnaise *of other manufacturers* at dealers' customary discounts.'
>
> "I conclude that the amended complaints do not show any unreasonable restraint of interstate commerce nor any monopoly forbidden by the anti-trust laws nor *any injury of the public* sufficient to support an action for treble damages under the Clayton Act. . ." (Emphasis supplied)

The Fifth Circuit in this case has been, we believe, unduly influenced by the opinion of this Court in the *Radovich* case, even though it is not cited in the opinion. That case was argued on brief and orally. The plaintiff's argument, in substance, was that *Radovich* had overruled not only the opinion of the Ninth Circuit in the case, but all previous similar decisions of the Circuit and District Courts. It was argued that after *Radovich*, treble damages could be recovered if a single competitor in a highly competitive field is injured, even if the public is not. In effect, the Fifth Circuit agreed.

In view of this, we believe it would be well, first, to analyze this Court's *Radovich* opinion to see exactly what it does hold, second, to compare it to the factual situation herein involved, and third, to consider the two Circuit Court cases decided after it, and their special relation to it.

1. In the first place, *Radovich* was a case which arose only on the pleadings, and the allegations of the complaint were necessarily accepted as true. The pleadings

charged a conspiracy to monopolize the business of professional football and to destroy its only competition and thus strengthen its monopolistic position. The complaint thereby charged primarily a violation of Section 2 of the Sherman Act.

Since the decision in 1911 in Standard Oil Co. v. U. S., 221 U. S. 1 (and see footnote 59 in U. S. v. Socony-Vacuum Oil Co., 310 U. S. 150) it has been recognized that a charge under Section 2 of the Sherman Act is automatically a charge under Section 1. In other words, a charge of monopolization is a *per se* violation of Section 1.

A number of types of conduct have been recognized by the Courts as *per se* violations. It is apparently with reference to such cases that Mr. Justice Clark, in *Radovich*, used the language on page 453 that

> "Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public."

Footnote 10, appended to this language, quotes approvingly from Apex Hosiery Co. v. Leader, to emphasize that certain forms of conduct have been "regarded as a special form of public injury." The types of conduct enumerated—restriction of production, raising of prices and market control to "the detriment of purchasers and consumers of goods and services"—are all obviously *per se* violations. All that this language seems to say is that where conduct is *per se* in violation of the Act, good intentions, or even some good results, will not prevent this conduct from being a violation.

This same point is discussed at length in Mr. Justice Douglas' opinion in U. S. v. Socony-Vacuum Oil Co., supra, especially at pages 211 to 218.

However, not all conduct claimed to be a violation of Section 1 is *per se* so. For instance, this Court in the "cellophane" case (U. S. v. DuPont, 351 U. S. 377, at page 387) said:

> "There is not, we think, any inconsistency between it (the Rule of Reason) and the development of the judicial theory that agreements as to maintenance of prices or division of territory are in themselves a violation of the Sherman Act. It is logical that some agreements and practices are invalid *per se*, while others are illegal only as applied to particular situations."

Mr. Justice Clark's reference in *Radovich* to "good intentions" and "some good results" is particularly illuminating because one of the arguments advanced by the defendant was that the "reserve clause", of which Radovich was complaining, was productive of good results, since it prevented "the strong from becoming stronger, and the weak weaker". See 231 F. (2nd) at page 622.

We believe the conclusion is obvious that *Radovich* goes no further than to hold that in a *per se* case, injury to the public interest need not be otherwise or further alleged, and that this is completely in line, not only with previous decisions of this Court, but with those decisions of the lower courts which hold that injury to the public must be shown.

Judge Barnes' remark in Klors, Inc. v. Broadway-Hale Stores, Inc., 255 F. (2nd) at page 231, that this Court in *Radovich* "has not departed one whit" from the requirement of public injury, is fully justified.

2. The instant case, however, is not a *per se* case by any stretch of the imagination. There is involved no price-fixing, no price-raising, no division of territory or customers, no agreement to refrain from competing, no agreement to reduce quality or quantity, no tying of one product to another, no monopoly, in short, none of the *per se* situations. Instead, there was at all times many, and an increasing number of, competitors, an unlimited supply of the commodity which the public could freely obtain at fully competitive prices. The case falls squarely within Mr. Justice Black's "simple example" in Northern Pacific Railway Co. v. U. S., 355 U. S. at page 653.

3. We turn now to the two appellate decisions rendered since *Radovich*. These cases are of especial significance, not only for their content and timing with reference to *Radovich*, but because of the identity of the writers of the opinions.

The opinion in Miller Motors, Inc. v. Ford Motor Co., 252 F. (2nd) 441, was written by Judge Simon E. Sobeloff, of the Fourth Circuit. Judge Sobeloff was Solicitor General when *Radovich* first came before this Court and signed the brief of the Government in support of the granting of certiorari. In the course of the opinion, Judge Sobeloff says:

> "Therefore, there being no showing of any public injury resulting from a restraint of commerce in automobiles or advertising, it cannot be said that the Sherman Act has been violated."

Radovich is not cited, although this Court's opinion was eleven months old, and Judge Sobeloff must have been aware of it. But the *Miller* case, like this one, was not a *per se* one, and Judge Sobeloff, correctly, we submit, considered *Radovich* not only not controlling, but not even pertinent.

The opinion in Klors, Inc. v. Broadway-Hale Stores, Inc., 255 F. (2nd) 214, was written by Judge Stanley N. Barnes of the Ninth Circuit. Judge Barnes was Assistant Attorney General in charge of the Anti-Trust Division, and signed the same brief as Judge Sobeloff did in *Radovich*. The opinion is an elaborate, closely reasoned and thorough analysis of the cases previous to *Radovich*, and of the *Radovich* opinion itself. We have already (page 17) quoted from the opinion and it should suffice at this point merely to say that Judge Barnes concludes, as did Judge Sobeloff, that in a non-*per se* case, it is still necessary to show an injury to the public.

The principle underlying these two cases, as well as those preceding *Radovich*, is the same as that underlying the "cellophane" case, supra, which seems to be that there is no violation if there is at all times in the relevant market an unlimited supply of interchangable commodities, competitively priced. That principle is also applicable here, for here, too, there was always an unlimited number of similar insurance policies, issued by many competing insurance companies, in a highly competitive industry, at fully competitive prices. The public could not have been injured.

It is submitted that the undisputed evidence in the record shows that there has been no violation of the Sher-

man Act, and consequently that the injury to the plaintiff did not result from such a violation. For this reason, plaintiff's treble damage action cannot be maintained.

The Propriety of Summary Judgment.

This case was begun in April of 1952. The parties took many depositions, both for discovery and for use as evidence. At least as early as November, 1954, the plaintiff knew that one of the principal points the defendants would make was the absence of public injury. The motions for summary judgment were served in May of 1956. The plaintiff had ample opportunity to procure whatever evidence it could of such public injury.

After the motions for summary judgment were made, the plaintiff could have tried to procure evidence of public injury or requested further time in which to do so, or made some showing of reasons why it was unable to do so. Rules of Civil Procedure, 56(f). The plaintiff did none of these, but instead moved for summary judgment in its favor on the question of the liability of the defendants. (Record, Vol. V, page 2705).

Where the facts which show that the plaintiff has no cause of action are undisputed after ample opportunity has been afforded the plaintiff to make a showing that a genuine issue exists as to these facts, and he does not do so, summary judgment is appropriate.

The possibility that the plaintiff may "better its case" before trial is not sufficient to render the entry of summary judgment reversible error. To allow the plaintiff to hold back its proof or to avoid summary judgment

when he fails to make a showing of a genuine issue of a material fact is contrary to the spirit of candor and the policy of disclosure which suffuses the Rules of Civil Procedure. The practice of so doing has been condemned by the Courts and by the leading text-writer, Professor Moore.

> "Nor is an opposing party, who has no countervailing evidence and who cannot show that any will be available at the trial, entitled to a denial of the motion for summary judgment on the basis of a hope that such evidence will develop at the trial."
>
> 6 Moore's Federal Practice, p. 2129.

The attitude of the Fifth Circuit on this point in the present case is surprising, in view of its previous decisions.

In Surkin v. Charteris, 197 F. (2nd) 77, the Court said, at page 79:

> "The sufficiency of the complaint does not control and, although the burden is on the moving party to demonstrate clearly that there is no genuine issue of fact, the opposing party must sufficiently disclose what the evidence will be to show that there is a genuine issue of fact to be tried. Wilkinson v. Powell, 5 Cir., 149 F. (2nd) 335; Christiansen v. Gaines, 85 U. S. App. D. C. 15; 174 F. (2nd) 534."

This is good law and should have been applied in this case to affirm, rather than reverse, the judgment of the District Court.

PRAYER

It is respectfully prayed that a writ of certiorari issue from this Court to the Court of Appeals for the Fifth Circuit, that the decision of that Court be reversed, and the judgment of the District Court be re-instated.

Respectfully submitted,

JAMES A. DIXON
908 Ainsley Building,
Miami 32, Florida,
Attorney for Petitioners.

CERTIFICATE OF SERVICE

I CERTIFY that on this _____ day of _____, 1958, a copy of the foregoing Petition for Writ of Certiorari was mailed to the following: BRUNDAGE & SHORT, 111 W. Washington Street, Chicago 2, Illinois, and WALTON, LANTAFF, SCHROEDER, ATKINS, CARSON & WAHL, DuPont Building, Miami, Florida, attorneys for Respondent BANKERS LIFE AND CASUALTY COMPANY; BRIGHAM, BLACK, NILES & WRIGHT, Brigham Building, Miami 32, Florida, attorneys for Respondent J. EDWIN LARSON; and POWELL, GOLDSTEIN, FRASER & MURPHY, Citizens and Southern Bank Building, Atlanta, Georgia, attorneys for Respondent HARTFORD ACCIDENT AND INDEMNITY COMPANY.

_____
Attorney for Petitioners.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16494

BANKERS LIFE AND CASUALTY COMPANY,

Appellant,

versus

J. EDWIN LARSON, ET AL.,

Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(June 30, 1958.)

Before HUTCHESON, Chief Judge, and TUTTLE and BROWN, Circuit Judges.

HUTCHESON, Chief Judge: This appeal is from a summary judgment[1] in a suit brought under Sec. 1 of

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[1] As material here the judgment, reciting that motions for summary judgment had been filed (1) by plaintiff, (2) by defendant J. Edwin Larson, and (3) by the other defendants, and that the court had heard argument of counsel and had considered the pleadings, the depositions, the exhibits, the briefs and reply briefs, and, declaring:

"It is the opinion of the court upon this record: that there

the Sherman Act, as amended, 15 U.S.C. Sec. 1 and Sec. 4 of the Clayton Act, 15 U.S.C., Sec. 15, to recover treble damages for injury to plaintiff's interstate business by a conspiracy among defendants.

Here insisting that it was impossible for the district judge on this voluminous record of nearly 3000 pages, containing evidence, some at least of the tendencies of which and the inferences from which support the charges of fraud and conspiracy made in the pleadings to reach the conclusion announced by him without first, as a fact finder, deciding questions of credibility and choosing between conflicting inferences or conclusions to be drawn from the facts, appellant argues in effect, that this is just another of the all too numerous cases, *Hyman v. Regenstein*, 222 F(2) 545, and the cases it cites, in which, by affixing to a decision on the facts an impermissible summary label, the trial judge has deprived the plaintiff of his right of trial by jury and proved once again the truth of the time worn adage that the longest way around is often the shortest way through. *Lockes, Inc. v. Bays*, 209 F(2) 610, at p. 615.

Pointing out that extensive use of pretrial discovery procedure was made by all parties resulting in the pro-

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is no genuine issue as to a material fact that, as a matter of law, the undisputed facts are legally insufficient to show a conspiracy as charged in the complaint between defendant J. Edwin Larson and Zack Cravey, or any other defendant; that inasmuch as the claim of the plaintiff against the remaining defendants * * *is predicated upon the existence of such a conspiracy, plaintiff is not entitled to recover against any defendant; and that the case is one for summary judgment."
denied plaintiff's motion for summary judgment and granted defendant Larson's motion and that of the other defendants.

duction of many depositions and documents, appellant urges upon us that in stating in his opinion: "The undisputed facts are legally insufficient to show a conspiracy as charged in the complaint.", the district judge really tried the case on the facts and reached his conclusion by the process of rejecting for reasons not stated by him all evidence[2] and all inferences which ran counter to what he considered to be the admitted or undisputed facts.

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[2] In his brief, appellant thus sums up the plan of the conspiracy and the method of carrying it out:

"The facts upon which plaintiff predicates the existence of a conspiracy are revealing of gross contempt for legal limitations on official authority and a shockingly mercenary attitude toward bribery and corruption. What on the surface professedly was conceived as a program of cooperative regulation of plaintiff, on examination stands unmasked as a nefarious scheme to destroy plaintiff's business for the benefit of the Sammons controlled corporations.

"Thus there was presented for determination by a jury not by the court as a matter of law a genuine issue as to the material fact whether Larson and Cravey, in good faith and with no intent to benefit the Sammons controlled corporations, engaged in and did not overstep the bounds of a program of cooperative regulation of plaintiff, or whether, under the guise of cooperative regulation but in reality for the benefit of the Sammons controlled corporations, they and the corporations conspired to destroy plaintiff's business in Georgia, Florida and other states and to prevent its expansion into states where it was not licensed.

"In the beginning Larson and Cravey apparently joined forces nominally to regulate, and to induce other Insurance Commissioners to regulate, the relationship of plaintiff to the public of the respective states comprising Zones 2 and 3 of a voluntary association known as the National Association of Insurance Commissioners, which frequently is referred to as NAIC. Ostensibly, then, there were at the outset legal and proper motives and purposes. The means employed were of another character.

* * * * *

"The means of purported regulation were threats and the instigation of threats that plaintiff's licenses to do business would not be renewed, or actual refusal or renewal of licenses, at such times and in such ways as would facilitate carefully planned and highly successful concerted efforts by the Sammons controlled corporations to obtain the agency forces and thus the business of plaintiff in various states. To that end Larson and Cravey enlisted

Setting out in his brief in support of his claim, references, to the report and actions of the committee appointed to investigate plaintiff, to extracts from the discovery deposition of Larson, to the correspondence between Cravey and Larson, to what is referred to as the Atlanta meeting of the commissioners on July 18, 1951, and to actions taken by Larson and Cravey against the plaintiff in Florida and Georgia, appellant thus concludes his argument:

> "On the basis of the foregoing, which necessarily omits many details, plaintiff urges that there were presented for determination by a jury and not by the court as matter of law at least the following genuine issues as to material facts:
>
> "1. Did Larson, Cravey and the Sammons controlled corporations conspire to destroy plaintiff's business in Georgia, Florida, and other states and to prevent its expansion into states where it was not licensed?
>
> "2. If Larson was not a conspirator, did Cravey and the Sammons controlled corporations so conspire?
>
> "3. If neither Larson nor Cravey was a conspirator, did the Sammons controlled corporations so conspire among themselves?"

the aid of Commissioners of other states, so that the scheme of the conspiracy became national in scope. The Sammons controlled corporations maintained the adherence and cooperation of Larson and Cravey through bribery of commissioners and their employees. Officials of these corporations were active participants in diagramming both the scheme and moves which would assure its success for the benefit of the corporations.'"

Insisting that it is impossible to determine from the court's terse statement whether, by ignoring or finding contrary to them, the lower court rejected the facts relied on by plaintiff, appellant cites and quotes from *Dulansky v. Iowa-Illinois Gas & Electric Co.*, 191 F.2d 881, at p. 884:

> "It is apparent from a consideration of the court's findings and conclusions that in determining whether or not there was a genuine issue of fact the court gave no thought to what inferences might reasonably be drawn from the circumstances. The case is largely dependent upon circumstantial evidence. The court also failed to view the evidence, as it should, in a light most favorable to the plaintiffs."

While making common cause against appellant in repelling his assault upon the summary judgment, Larson and his co-defendants, the insurance companies, filed separate briefs in which the approach of each was quite different. Larson, drawing protectingly about himself the cloak of his claimed official immunity from suit for his actions as a state officer, from the assumed vantage point of his claimed untouchability, attacks plaintiff and his cause in language more denunciatory than convincing, more calculated to generate heat than light. In short, instead of meeting the burden cast upon him under this record of showing by argument and discussion that, in disposing of the case by summary judgment, the district court did not deprive plaintiff of his constitutional right of trial by jury, appellee Larson seeks, in part, to do so by sweeping animadversions upon the good faith of plaintiff and his claims. Assuming the very issue which is pre-

sented for determination, whether as matter of law the acts complained of by plaintiff as done by Larson were official acts done for the purpose alone of carrying out his official duties and, therefore, he was immune from suit as to them, and not personal acts done as a part of a conspiracy against plaintiff, appellee Larson,—though the district judge did not give this as a reason for his decision and the record does not show plainly, if at all, that as a matter of law this is so—devotes the greater part of his brief to putting forward this claim of immunity.

The other appellees, while putting forward and arguing the same proposition, that concerted official action by agreement between state officials is not within the scope of the prohibitions of the Sherman Act because such prohibitions are directed against private persons' actions and not against actions of state officials, and presenting their case in less ex cathedra, less pontifical and less hortatory fashion, make the additional points set out below in favor of the correctness of the judgment.

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(1) The complaint does not allege and the proof does not show any injury to the public, in fact the record shows the contrary.

(2) There is no proof in the record that Mr. Larson and Mr. Cravey engaged in a conspiracy against the plaintiff.

(3) There is no proof in the record that the insurance companies joined in the supposed pre-existing conspiracies between Larson and Cravey with knowledge of the existence of such conspiracies.

(4) If Bradley, one of the Vice-Presidents on whose actions and statements plaintiff's claim is to some extent based, did join in any illegal agreement, he had no authority to do so from the defendant companies and his actions cannot be imputed to them.

(5) They attack, as inadmissible, some of the evidence relied on by plaintiff, including the transcript of the meeting of insurance commissioners and the so-called Bradley reports to his employer.

Proceeding under these heads in a lengthy brief of more than 100 pages, replete with inferences and conclusions drawn from the swollen record as a whole, they seem to us to argue the case as though it had been fully tried below and the question presented for discussion here was whether a verdict or judgment based upon such a trial should or should not be set aside as without evidence to support it, rather than, as in fact is the case here, whether as matter of law there was or was not a genuine issue as to a material fact, and the case was or was not properly disposed of on summary judgment.

Apparently assuming that on a trial the plaintiff could not have bettered its case, the appellees present their case as thought this court must either affirm the judgment out of hand or take upon itself the burden of searching the 3000 pages of record to find therein some justification for a judgment which neither the district judge, by opinion or findings, nor the appellees, by brief, have convincingly pointed out.

We cannot agree with this view. On the contrary, viewing the record as a whole and without a line by line examination of it, we are of the opinion that this case is in its nature not susceptible of being disposed of by summary

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In addition to these points, a special point is made by the Hartford Indemnity Co., sued as surety of Cravey, that the surety is liable only when the principal is liable and that Cravey, the principal, is not liable either at common law or under any applicable Georgia statute, and the bond does not run to, or cover actions of the kind brought here.

judgment and that, saying so, we could, without more, order the judgment reversed and the cause sent back for trial on the merits.

However, though in the posture of this case, by the failure of the district judge to make and file an opinion or in any other way support his summary disposition of this complicated case, we have been deprived of his aid and assistance, we have, in the light of the briefs, the arguments and the record examined his meager conclusions sufficiently to satisfy ourselves: that no adequate showing has been made that there is any basis in the record for his conclusion that, though a case was stated in the pleadings, the plaintiff was as matter of law not entitled to a trial of the issues tendered in them; and that he erred in his conclusion and in the judgment entered thereon.

Of appellees' point one, of which they make so much in citing and discussing the cases, that the complaint does not allege and the proof does not show any injury to the public and for that reason no case for relief is presented, it is sufficient to say that in our opinion, as applied to this

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4 Cf. Whitaker v. Coleman, 115 F(2) 305; and Winter Park v. Southern Bell, 181 F(2) 341, where the court said:

"We are of the opinion that this case is not one that readily lends itself to such a summary disposition.

"The facts and circumstances, although in no material dispute as to their actuality, reveal aspects from which inconsistent hypotheses might reasonably be drawn and as to which the minds of reasonable men might differ.

"The drawing of inferences and the acceptance of hypotheses arising out of the facts are ordinary attributes that the judicial process has conferred upon the finder of the facts."

case, appellees have completely misconceived and misapplied the principle they invoke. As to the complaint, there are clear, definite and full allegations that the conspiracy charged against the defendants was for the purpose and with the result not only of unlawfully restraining plaintiff's trade and commerce among the several states but of suppressing, burdening and obstructing interstate commerce, thus alleging at once both public and private injury.

As to proof, we think it quite clear that here, as in other aspects of the case, appellees have not borne their burden of demonstrating that as matter of law there was no evidence which, if taken in the light most favorable to plaintiff, tended to establish the truth of its allegations.

On the point so strongly relied on by all appellees, that Larson, because of his official position as a state officer, is immune from accountability in this suit, it is sufficient to say that there is no authority, statutory or otherwise, authorizing the insurance commissioners of Georgia or Florida to conspire with persons to restrain commerce or exempting them from suit if they do so,[5] and that Mr. Larson's vigorous denial of responsibility is really based not on any claim that if he did conspire he would nevertheless be immune but on his insistence that everything he did was in the line of duty and within the scope of his authority, as a state officer and not as a conspirator, and that as matter of law there is no evidence to the contrary.

[5] Cf. Standard Oil Co. of Calif. vs. Moore, 251 F.(2) 188; Parker v. Brown, 317 U.S. 341; Floyd v. Gage, 192 F.(2) 137.

Because the case was erroneously disposed of by summary judgment, the judgment is REVERSED and the cause is REMANDED for further and not inconsistent proceedings, including trial on the merits.

A true copy

Test: s/ EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana
(SEAL)

APPENDIX B

JUDGMENT.

Extract from the Minutes of June 30, 1958.

No. 16494.

BANKERS LIFE AND CASUALTY COMPANY,

versus

J. EDWIN LARSON, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings, including trial on the merits:

It is further ordered and adjudged that the appellees, J. Edwin Larson, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX C

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: Provided, That nothing contained in Sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the

court. July 2, 1890, c. 647, section 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693.

Section 1 of the Sherman Act, 15 U. S. C., Section 1.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, section 4, 38 Stat. 731.

Section 4 of the Clayton Act, 15 U. S. C., Sec. 15.